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## Bankrupt Act—Illegal Preferences.

We lay before our readers in this issue, the recent opinion of the Supreme Court of the United States as to the effect of the bankrupt act on the right of creditors to resort to state process to acquire liens on the property of insolvent debtors, and as to the elements essential to constitute an illegal preference, or an intent on the debtor's part to defeat the operation of the bankrupt act. Practically viewed, the opinion is one of unequalled importance. It is not, perhaps, too much to say that it *revolutionizes* all current notions on the subject; but it is strongly reasoned and embodies the deliberate judgment of the entire bench.

## Statute Revision in New York.

We learn from the Albany Law Journal that the revision of the statute of law of New York, is progressing as rapidly as is consistent with a thorough execution of the work, and in a satisfactory manner. Among the features of the new code, we note the following: The word "ejectment" is formally recognized, and the word "replevy" restored, in place of the awkward phrase, "claim the immediate delivery," which had supplanted it in the Code of Procedure. The statute against purchasing lands held adversely, is very sensibly expunged. Another sensible provision is that in an action for partition, if the title is in dispute, the parties shall not be remitted to a separate suit, but the question of title shall be tried and settled in the same action in which the partition is sought. Another provision allows reversioners and remainder-men to maintain an action for partition; but this allowance is wisely confined to cases where an actual partition can be had, and does not extend to permitting sales for partition. The reason assigned for this is that sales of land encumbered by an intermediate estate, generally result in a sacrifice of the property sold; and as the co-tenants in such cases are generally infant heirs, a proceeding ought not to be permitted which might, in many cases, work irreparable injury to them. One remedy by action has been provided for the recovery of dower; and to accomplish this, it is recommended that the surrogate, as such, be deprived of his present jurisdiction over this subject; and jurisdiction of proceedings for the recovery, as well as for the admeasurement of dower, is vested in the county courts.

## Discretionary Power of Fixing Punishment, in Criminal Cases.

The message of Governor Noyes to the Ohio Legislature contains the following suggestions of a reform in the laws with reference to the *quantum* of punishment in criminal cases:

"Another year's experience in the matter of hearing and deciding applications for pardon, has confirmed me in the opinion that the law should be so modified, as to leave less discretion with the courts in passing sentence for criminal offences. It often happens that two prisoners work side by side in the penitentiary, both sent there for precisely the same crime, one for one year and the other for ten. In such case, it is impossible to convince the convict incarcerated for the longer time that he has been fairly dealt with. And so long as he is stung with a sense of this injustice, he is not likely to reform. There is nothing approaching uniformity in the length of sentences pronounced by different judges for similar offences. I earnestly recommend

that the criminal law be so changed as to secure more exact justice; so amended as to leave results affecting the lives and liberties of men less dependent upon the judgment, the temperament or the caprice of those who administer the law."

Undoubtedly, there must in most cases be a discretion reposed somewhere, and within certain prescribed limits, as to the *quantum* of punishment which a given offence shall carry with it. In some states, as at common law, this discretion resides in the judge; in others it is reposed in the jury. Evidently the policy of the law should be to limit this discretion as much as possible. It would seem worth while to consider, whether in larceny, embezzlement, false pretences, and other like offences affecting property, the punishment might not be gauged more nearly by the *value* of the property affected by the crime. This might to some extent do away with what is now a reproach to the administration of justice, that the small thieves are punished more severely than the great ones. But in cases of homicide, and assaults to kill, wound or beat, where the defendant frequently acts upon strong provocation or from a principle of self-preservation, and where no two cases stand on the same footing with reference to the quality of the act committed, a provision of law which leaves a large discretion in the court or jury with reference to the *quantum* of the punishment, would seem to be conceived in a spirit of justice and mercy. At all events, the question deserves of more extended investigation and patient thought, than the average legislator will find time to bestow upon it; and the wise course would seem to be to submit it to a commission, to report to another session.

## Liability of Master to Servant—Fellow Servants in Common Service.

The Supreme Court of the United States on the 5th inst., decided an interesting case as to the liability of masters to servants, where the main defence was that the servant injured, and the servant by whose fault he was injured, were fellow-servants in a common employment. We refer to the case of *Fort v. Union Pacific Railroad Co.* A full report of the case below is given in 2 Dillon, C. C. R. 259. The following is a brief statement of it:

The action was brought by plaintiff to recover damages for an injury to his minor son, resulting in the loss of an arm while in the employ of the defendant.

The defendant, in its works at Omaha had a car department, of which Mr. Gamble was the superintendent; under him, and having immediate control of the shop, was a foreman, Mr. Ballou; under the foreman there were various sets, or, as a witness called them, "gangs," of men, under the immediate direction and control of some employe or "boss." Among those having control of a set or gang of men working in the shop was a Mr. Collett, whose duty it was to run and superintend the running of a certain machine, or certain machinery, in the shop. From the time the plaintiff's son was employed, he had been working under Collett, obeying his orders and directions; and the chief employment of the son had been at a moulding machine, receiving and putting away mouldings as they came from the machine. After the son had been

thus engaged for some months, on the day the accident in question happened, a belt or band connected with a shaft, some fourteen or sixteen feet high, was off the drum, or pulley, and needed lacing. It did not very clearly appear whether the belt thus out of order belonged to the moulding machine or some other machine near by; but it was within the scope of Collett's duty to see that it was repaired. At the time of the accident, Collett, wishing to lace the band at the end near the floor, ordered the plaintiff's son, about sixteen years of age, to ascend a ladder resting on the shaft at the upper end, which shaft was in motion at the rate of one hundred and seventy-five or two hundred revolutions per minute, and hold or keep the band or belt away from the shaft, while he (Collett) laced or sewed it together at or near the floor; and the right arm of plaintiff's son, while thus engaged, pursuant to the orders of Collett, was caught, or in some way became entangled, in the belt, or drawn between it and the shaft, and was instantly crushed to pieces and torn from his body.

The jury made the following *special finding* in regard to the nature of the employment of Collett and of the plaintiff's son, and the cause of the injury, to-wit:

"We find that the car department of the defendant was under the management of a general superintendent, who employed and dismissed the hands; that the shop, as to practical operations therein conducted, was under a foreman; that the employes were divided, according to their work, into sets, with an under or immediate foreman; that one of these under-foremen was Mr. Collett, named in the petition, under whom plaintiff's son was to and did serve, as a workman or helper, and whose orders he was to and did obey; that Collett had charge of running and superintending certain machinery in the shop. We find that the plaintiff's son was injured in executing or carrying out an order of Collett, as described in the petition; that this order related to a matter within the scope of Collett's duty and employment. We find that the order to the plaintiff's son (in carrying out which he lost his arm) was one which was not within the scope of the son's duty and employment. We find that it was not a reasonable order, and that its execution was attended with hazard to life or limb, and that a prudent man would not have ordered the boy to execute it."

There was no statute of the state touching the case.

The judgment of the circuit court for the plaintiff was affirmed. Mr. Justice DAVIS delivered the opinion. The ground of liability was that, although an employer may not be an insurer of the lives and limbs of his servants, he is impliedly bound not to expose them to such hazard when not reasonable or necessary to do so, and the extra-hazardous service at which the plaintiff's son was put when he was injured, was not within the scope of his employment or the contract of service. Mr. Justice BRADLEY dissented on the ground that the boy and the superior servant were fellow servants in the same common employment, and hence the employer was not liable.

—GOVERNOR BEVERIDGE, in his message to the Illinois legislature, urges the completion of the revision of the laws by the present general assembly, and the publication of the laws in a compact form, for the use of the various officers throughout the state. He says: "The state has no copies of the session laws for distribution. If it had, the laws in that form are inconvenient, especially to a large number of persons, not versed in law, who exercise official duties for the public good, to the sacrifice of their own private interests."

## Bankrupt Act—Illegal Preference—Judgment in State Court.

WILSON, ASSIGNEE OF VANDERHOOF BROS. v. CITY BANK OF ST. PAUL.

*Supreme Court of the United States, October Term, 1873.*

**Bankrupt Act—Illegal preference.**—Judgment in State Court.—Section 39 of the bankrupt act as respects an insolvent debtor, *suffering* his property to be taken on legal process, with *intent* to give a preference to a creditor, or to defeat or delay the operation of the act, construed, and the following propositions ruled:

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy, is not a sufficient evidence of such preference, or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

The facts are stated in the opinion of the court, delivered by Mr. Justice MILLER, as follows:

This case comes before us on a certificate of division in opinion between the circuit and district judge for the district of Minnesota.

The statement of facts and the questions certified are as follows:

The complainant is the assignee in bankruptcy of the firm of Vanderhoof Bros., lately merchants in the city of Saint Paul. The defendant is the City Bank of St. Paul. The bill is filed to determine which of the parties is entitled to the stock of goods, of the bankrupts, or the proceeds thereof. The assignee claims the goods, or the proceeds thereof, as assets of the bankrupts' estate. The bank claims the same by virtue of a judgment, execution, and levy thereunder. The facts are as follows:

On the 26th of February, 1870, judgment by default was rendered by one of the district courts of the State of Minnesota, in favor of the bank against Vanderhoof Bros. for the sum of \$2,130. On the same day execution was issued, and the sheriff immediately made a levy upon the whole stock of goods of the debtors, which was sold by him for \$2,385, which is now in the hands of the bankrupt court to await the determination of this suit. The suit by the bank was brought on promissory notes, commercial paper made by the debtors, Vanderhoof Bros., to the City Bank of St. Paul, one of which notes was more than fourteen days past due when suit was brought thereon by the bank.

After the levy of the said execution, and before the sale by the sheriff, Vanderhoof Bros. were adjudicated bankrupts on the petition of creditors filed against them after judgment had been obtained, and levy made under the execution. The Vanderhoofs had no defence to the notes upon which the bank had sued them, and put in no defence. They had no property except their said stock in trade, which, at cost prices, was about equal to the amount of their liabilities.

The debtors, Vanderhoof Bros., were insolvent when said suit was brought against them by the bank, and the bank had then reasonable cause to believe it, and knew that they had committed an act of bankruptcy, and that they had no property but their said stock in trade. The Vanderhoofs gave no notice to any of their creditors of the suit commenced against them by the bank, and, having no defence, did not defend it nor go into voluntary bankruptcy, nor otherwise make any effort to prevent the judgment being obtained or the levy of the execution.

On the trial the following questions arose, in relation to which the judges were opposed in opinion:

1. Whether or not an intent on the part of said debtors, Vanderhoof Bros., to suffer their property to be taken on legal

process, to-wit, the said execution, with intent to give a preference to said bank, or with intent thereby to defeat or delay the operation of the bankrupt act, can be inferred from the foregoing facts.

II. Whether, under said facts, the said bank, in obtaining said judgment and making the said levy had reasonable cause to believe that a fraud on the bankrupt act was intended.

III. Whether, under said facts, the bank obtained by the levy of the execution a valid lien on the said goods as against the assignee in bankruptcy.

The questions thus presented to this court require, for a satisfactory answer, a careful consideration and construction of sections thirty-five and thirty-nine of the bankrupt law, with reference to the general spirit and purpose of that law. In looking to these, the first and most important consideration which demands our attention is the discrimination made by the act between the cases of voluntary and involuntary bankruptcy. In both classes of cases, undoubtedly, the primary object is to secure a just distribution of the bankrupt's property among his creditors, and in both the secondary object is the release of the bankrupt from the obligation to pay the debts of those creditors.

But in case of voluntary bankruptcy, the aid of the law is invoked by the bankrupt himself, with the purpose of being discharged from his debts as his principal motive, and in the other, the movement is made by his creditors with the purpose of securing the appropriation of his property to their payment, the discharge being with them a matter of no weight and often contested.

There is a corresponding difference in the facts on which the action of the court can be invoked in these different classes of bankruptcy. When the party himself seeks the aid of the court, the averment he is required to make is a very simple one, namely, that "he is unable to pay all his debts in full, and is willing to surrender all his estate and effects for the benefit of his creditors, and desires to obtain the benefit of the act," that is, to be discharged from the claims of his creditors. On filing a petition containing this request, he is declared by the court a bankrupt. The allegation cannot be traversed, nor is any issue or enquiry as to its truth permitted. The administration of his effects proceeds thereafter under the direction of the court, and may end in paying all his debts with a surplus to be returned to the bankrupt, or the result may be nothing for the creditors, and the unconditional release of the bankrupt.

But while the debtor may, on this broad basis, call on the court to administer his estate, the creditor who desires to do the same thing is limited to a few facts or circumstances, the existence of which are essential to his right to appeal to the court. And when any one of these facts is set forth in a petition to the court by the creditor, the truth of the allegation may be denied by the debtor, and on the issue thus found, he may demand the verdict of a jury.

The reason for this wide difference in the proceedings in the two cases is obvious enough. When a man is himself willing to refer his embarrassed condition to the proper court with a full surrender of all his property, no harm can come to any one but himself, and there can be no solid objection to the course he pursues. But when a person claims to take from another all control of his property, to arrest him in the exercise of his occupation, and to impair his standing as a business man; in short, to place him in a position which may ruin him in the midst of a prosperous career, the precise circumstances or facts on which he is authorized to do this, should not only be well defined in the law, but clearly established in the court.

It is the thirty-ninth section of the bankrupt act which lays down, in nine or ten sub-divisions, the facts and circumstances which give a man's creditors the right to have him declared a bankrupt, and his property administered in a bankruptcy court. One of

them is the case of a person, who being a bankrupt or insolvent, or in contemplation of insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment, or procure or *suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors*, or to any person or persons, who may be liable for him as endorsers, bail, sureties, or otherwise, or with intent by such disposition of his property to defeat or delay the operation of the act. And the same section declares that if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred, contrary to the act; provided, the person receiving such payment or conveyance, had reasonable cause to believe that a fraud on the bankrupt act was intended, or that the debtor was insolvent.

The case before us is one of involuntary bankruptcy, but there is no question here whether the party was rightfully declared a bankrupt. The statement of facts shows that the debtors were insolvent when the bank commenced its proceedings in the state court, and that the bank had then reasonable cause to believe they were insolvent, and knew that they had committed an act of bankruptcy, to-wit, had permitted one of their notes to go unpaid more than fourteen days after it was due.

It is maintained that under these circumstances the bankrupt "suffered his property to be taken on legal process with intent to give a preference to the bank, and to defeat or delay the operation of the act." Undoubtedly, the facts stated bring the bank within the proviso, as to knowledge of the debtor's insolvency; and if the debtor suffered his property to be taken, within the meaning of the statute, with intent to defeat or delay the operation of the act, then the assignee shall recover the property; so that this suffering and this intent on the part of the bankrupt are the matters to be decided. The first and principal question on which the judges became divided is, whether such intent is to be inferred from the facts stated.

The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in contemplation of insolvency or bankruptcy, declares that any attachment or seizure under execution of such person's property, *procured by him with a view to give such a preference*, shall be void if the act be done within four months preceding the filing of the petition in bankruptcy by or against him. Though the main purpose of the thirty-ninth section is to define acts of the trader which make him a bankrupt, and that of the thirty-fifth is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preferences void, and enabling the assignee of the bankrupt to recover the property; and both of them make this to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt's insolvent condition, by the other party to the transaction. Both of them describe, substantially, the same acts of payment, transfer, or seizure of property so declared void. It is, therefore, very strongly to be inferred that the act of *suffering* the debtor's property to be taken on legal process in section thirty-nine, is precisely the same as *procuring* it to be attached or seized on execution in section thirty-five. Indeed the words *procure* and *suffer* are both used in section thirty-nine.

What, then, is the true meaning of that phrase in the act? In both cases it must be accompanied with an intent. In section thirty-five it is to give a preference to a creditor; in section thirty-nine it must be to give a preference to a creditor, or to defeat or delay the operation of the bankrupt act. In both there must be the positive purpose of doing an act forbidden by that statute, and the thing described must be done in the promotion of this unlawful purpose.

The facts of the case before us do not show any positive or affirmative act of the debtors, from which such intent may be in-

ferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them and recovered judgment, and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the bankrupt act.

There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the state court would have been a moral wrong, and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankruptcy proceedings. The debtor neither hindered nor facilitated any one of them. How is it possible from this to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?

It is said, however, that such an intent is a legal inference from such inaction by the debtor, necessary to the successful operation of the bankrupt law; that the grand feature of that law is to secure equality of distribution among creditors in all cases of insolvency; and that, to secure this, it is the legal duty of the insolvent, when sued by one creditor in an ordinary proceeding likely to end in judgment and seizure of property, to file himself a petition of voluntary bankruptcy, and that this duty is one to be inferred from the spirit of the law, and is essential to its successful operation.

The argument is not without force, and has received the assent of a large number of the district judges, to whom the administration of the bankrupt law is more immediately confided. We are, nevertheless, not satisfied of its soundness. We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only, because it is duty imposed by the law. It is equally clear that there is no such duty imposed by that act, in express terms. It is, therefore, an argument solely of implication. This implication is said to arise from the supposed purpose of the statute to secure equality of distribution in *all cases* of insolvency, and to make the argument complete, it is further necessary to hold that this can only be done in bankruptcy proceedings under that statute. Does the statute justify so broad a proposition? Does it in effect forbid all proceedings to collect debts in cases of insolvency, in other courts, and in all other modes than by bankruptcy [proceedings?] We do not think that its purpose of securing equality of distribution is designed to be carried so far.

As before remarked, the voluntary clause is wholly voluntary. No intimation is given that the bankrupt *must* file a petition under any circumstances. While his *right* to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome, and often, ruinous duty.

It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is, by the statute, given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases. The argument we are combatting goes upon the hypothesis that there is another class given to the creditor by inference, namely, where the debtor ought himself to go into court as a bankrupt, and fails to do it. We do not see the soundness of this implication from anything in the statute.

We do not construe the act as intended to cover *all cases* of insolvency, to the exclusion of other judicial proceedings. It is

very liberal in the classes of insolvents which it does include, and needs no extension in this direction by implication. But it still leaves, in a great majority of cases, parties who are really insolvent, to the chances that their energy, care, and prudence in business may enable them finally to recover without disastrous failure or positive bankruptcy. All experience shows both the wisdom and justice of this policy.

Many find themselves with ample means, good credit, large business, technically insolvent; that is, unable to meet their current obligations as fast as they mature. But by forbearance of creditors, by meeting only such debts as are pressed, and even by the submission of some of their property to be seized on execution, they are finally able to pay all, and to save their commercial character and much of their property. If creditors are not satisfied with this, and the parties have committed an act of bankruptcy, any creditor can institute proceedings in a bankruptcy court. But until this is done, their honest struggle to meet their debts and to avoid the breaking up of all their business, is not, of itself, to be construed into an act of bankruptcy, or a fraud upon the act.

It is also argued, that inasmuch as to lay by and permit one creditor to obtain judgment and levy on property, necessarily gives that creditor a preference, the debtor must be supposed to intend that which he knows will follow.

The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons' acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them.

Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the sections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where no action is required by positive law or good morals, be construed into such a preference as the law forbids?

The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act, a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment.

Undoubtedly, very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act, would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication.

These latter considerations serve to distinguish the present case from that of *Buchanan v. Smith*, (16 Wall. 277,) decided at last term, and which may seem to conflict, in some of the expressions used in that opinion, with those found in this. That was a bill in chancery involving several distinct issues of fact, on which much and conflicting testimony was given, and the contention was mainly as to what was established by the evidence. There was satisfactory proof that the creditor, before pursuing his remedy in the state court, had urgently sought to secure a preference by obtaining from the debtor a transfer of certain policies of insurance on which a loss was due. The case was also complicated by an assignment made by the debtor, under which the assignee took

possession before the creditor procured his judgment in the state court. That case was well decided on the evidence before the court. But in the case now before us, the questions we have discussed are presented nakedly and without confusion, by facts found by the court and undisputed, and we have been compelled, on careful consideration of the bankrupt act, to the following conclusions:

1. That something more than passive non-resistance of an insolvent debtor to regular judicial proceedings, in which a judgment and levy on his property are obtained, when the debt is due and he is without just defence to the action, is necessary to show a preference of a creditor, or a purpose to defeat or delay the operation of the bankrupt act.

2. That the fact that the debtor under such circumstances does not file a petition in bankruptcy, is not sufficient evidence of such preference, or of intent to defeat the operation of the act.

3. That, though the judgment creditor in such case may know the insolvent condition of the debtor, his levy and seizure are not void under the circumstances, nor any violation of the bankrupt law.

4. That a lien thus obtained by him will not be displaced by subsequent proceedings in bankruptcy against the debtor, though within four months of the filing of the petition.

These propositions require the questions certified to us to be answered as follows: The first and second in the negative, and the third in the affirmative.

NOTE.—The case in the court below is reported in 1 Dillon C. C. R. 476, where the facts are more fully stated than they were in the record before the supreme court. The essential features of the case, however, appear in the foregoing opinion, which will attract attention, as perhaps, the most important adjudication under the bankrupt act, yet made by the supreme court.

The opinion is without any reported dissent, and it is plain that it was carefully prepared and the subject thoroughly considered. We do not now recall an opinion of any district or circuit court in which precisely the same view has been taken of the subject: certain, it is, that the almost uniform judgment of these tribunals has been otherwise, and in accord with the general tone of *Buchanan v. Smith*, 16 Wall. 277. But by reference to the case of *Wright v. Filley*, 1 Dillon C. C. R. 171 (1871), it will be seen that the same distinguished judge who delivered the opinion printed above, entertained at that time the views now sanctioned by the supreme court.

The principal case is said in the opinion to be distinguishable from *Buchanan v. Smith*; but as this latter case is reported, it would seem to be more correct to say that it is overruled. Much of its reasoning, certainly, is overthrown.

The bankrupt act prohibits an insolvent from suffering his property to be seized on legal process with intent to give a preference, or to defeat or delay the operation of the act. In the principal case, the local creditor, the bank, knowing that its debtor, a merchant, had committed an act of bankruptcy, and also, having reason to know his insolvency, commenced suit in the state court and obtaining a judgment by default, immediately levied upon his entire stock in trade, his only property, the debtor all the time remaining passive, neither informing his other creditors of the suit of the bank, nor himself going into bankruptcy, nor otherwise making any effort to prevent the judgment or the levy of the execution; and the supreme court hold that these circumstances do not authorize the conclusion that the debtor suffered this to be done with intent to defeat the bankrupt act. Speaking of this point, the court says: "There must be the positive purpose of doing the act forbidden by the statute, and the thing described must be done in the promotion of this unlawful purpose," and "the facts of the case before us do not show any positive or affirmative act of the debtor from which such intent can be inferred." One circumstance not particularly dwelt upon by the supreme court, but which had weight with the circuit court in deducing the inference that the debtors intended to delay or defeat the operation of the bankrupt act, was that, under the state practice, a judgment by default could be obtained in a few days, and that the debtors gave no notice or information to other creditors that the suit of the bank was pending.

The great practical significance of the principal case is, that it authoritatively establishes, under the act as it now stands, that a creditor, knowing his debtor to be insolvent, and therefore, not able to pay all his debts, may use the remedies and process given him by state laws, and hold liens acquired by levies thereunder, made before proceedings in bankruptcy commenced, pro-

vided there is no collusion with the debtor, and no actual, positive intent, manifested by some affirmative act on the part of the latter to give the former a preference, or to defeat the operation of the bankrupt enactment.

### Agreement Between Corporation and Stockholder to Convert Indebtedness for Stock into a Loan—Set-off under the Bankrupt Law.

SAWYER v. HOAG, ASSIGNEE OF LUMBERMAN'S INSURANCE COMPANY.

*Supreme Court of the United States, October Term, 1873.*

1. Corporations—Capital Stock Trust Fund for Creditors.—It is well settled that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation.

2. Agreement to Convert Stock into Loan void as to creditors.—It results from this doctrine, that any agreement between a corporation and one of its stockholders who is in debt to the corporation for stock, by which his indebtedness or stock is converted into a loan from the corporation to him, is fraudulent and void as to the creditors of the corporation, although it may be good between the parties to the transaction.

3. Suit against Stockholders by Assignee in Bankruptcy of Corporation—Set-off.—It follows that a stockholder of an insolvent corporation, who is sued by the assignee in bankruptcy of the corporation, for money due for stock, will not be permitted to set off against such suit, a demand against the corporation purchased from a creditor; because the money due for unpaid stock, being a trust fund for all the creditors, cannot be applied exclusively to the payment of one claim; and it makes no difference whether the claim was acquired before or after the act of bankruptcy.

4. Statute Construed—Bankrupt Act, § 20—Set-off.—Section 20 of the bankrupt act does not enlarge the doctrine of set-off, nor enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual, and in the same right.

5. Assignee in Bankruptcy, Representative of creditors.—An assignee in bankruptcy is the representative of the creditors, as well as of the bankrupt. Therefore, in a case like the present, the assignee in bankruptcy of an insolvent corporation may assert the rights of the creditors, against a stockholder of the corporation who is indebted to the corporation for stock.

Appeal from the circuit court of the United States for the northern district of Illinois. The case is fully stated in the opinion.

Mr. Justice MILLER delivered the opinion of the court.

The Lumberman's Insurance company, of Chicago, like most the other local insurance companies of that city, was found to be insolvent after the disastrous fire of October, 1871; and in June, 1872, a petition was filed, under which it was declared bankrupt, and the appellee appointed assignee. The appellant was a stockholder in the company to the extent of fifty shares of one hundred dollars each. Among the effects of the company which came to the hands of the assignee, was a note of appellant for \$4,250, and when payment was demanded of him, he produced and offered to set off against this demand the certificate of an adjusted loss given by the company to one Hayes for \$5,000, which had been assigned by Hayes to appellant. This certificate was given to Hayes and purchased by appellant at thirty-three per cent. of its par value, on the same day, namely, January 25, 1872, after the insolvency of the company was well known, but before any proceedings in bankruptcy had been commenced. Upon the refusal of the assignee to consent to this set-off, the appellant filed the present bill in the district court to enforce the set-off, in which he alleged, among other things, that the note given by him to the insurance company was for money loaned.

The assignee, in his answer denies that the note was for money loaned, and avers that it was, in fact, for a balance due by appellant for his stock subscription, which had never been paid, and insists that such balances constitute a trust fund for the benefit of all creditors of the insolvent corporation, which cannot be made the subject of a set-off against an ordinary debt due by the company to one of its creditors. After the general replication, the case was submitted to the district court on an agreed statement of facts. The district court decreed against the complainant, from which he appealed to the circuit court, which affirmed the decree below, and from that decree it is brought by appeal to this court,

The first and most important question to be decided is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription.

The charter under which the company was organized, authorized it to commence business upon a capital stock of \$100,000, with ten thousand paid in, and the remainder secured by notes with mortgages on real estate or otherwise. The transaction by which appellant professes to have paid up his stock subscription is, shortly, this: He gave to the company his check for the full amount of his subscription, namely, \$5,000. He took the check of the company for \$4,250, being the amount of his subscription, less the fifteen per cent. required of each stockholder to be paid in cash, and he gave his note for the amount of the latter check, with good collateral security for its payment, with interest at seven per cent. per annum. Appellant and the company, by its officers, agreed to call this latter transaction a loan, and the check of the appellant, payment in full of his stock, and on the books of the company, and in all other respects as between themselves, it was treated as payment of the subscription and a loan of money. It is agreed that at this time the current rate of interest in Chicago was greater than seven per cent., and it is not stated as a fact whether these checks were ever presented and paid at any bank, or that any money was actually paid or received by either party in the transaction. It must, therefore, be treated as an agreement between the corporation, by its officers, on the one part, and the appellant, as a subscriber to the stock of the company, on the other part, to convert the debt which the latter owed to the company for his stock, into a debt for the loan of money, thereby extinguishing the stock debt.

Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually as far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other, if it was found to be mutually convenient to do so. And in any controversy which might or could grow out of the matter between the insurance company and the appellant, we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full.

And on this consideration, one of the main arguments on which appellant seeks to reverse the decree stands. He assumes that the assignee in bankruptcy is the representative alone of the corporation, and can assert no right which it could not have asserted. The weakness of the argument is in this assumption. The assignee is the representative of the creditors as well as the bankrupt. He is appointed by the creditors. The statute is full of authority to him to sue for and recover property, rights, and credits, where the bankrupt could not have sustained the action; and to set aside as void transactions by which the bankrupt himself would be bound. All this, of course, is in the interest of the creditors of the bankrupt.

Had the creditors of this insolvent corporation any right to look into and assail the transaction, by which appellant claims to have paid his stock subscription?

Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation. And when we consider the rapid development of corporations as instrumentalities of the commercial and business world in the last few years, with the corresponding necessity of adapting legal principles to the new and varying exigencies of this business, it is no solid objection to such a principle that it is modern; for the occasion for it could not sooner have arisen.

The principle is fully asserted in two recent cases in this court, namely: *Burke v. Smith*, 16 Wallace, 390, and in *Burke v. New*

*Albany*, 11 Wallace, 96. Both these cases turned upon the doctrine we have stated, and upon the necessary inference from that doctrine, that the governing officers of a corporation cannot, by agreement or other transaction with the stockholder, release the latter from his obligation to pay, to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration.

In the latter case, a judgment creditor of an insolvent railroad company, having exhausted his remedy at law, sought to enforce this principle by a bill in chancery against the stockholders. The court, by affirming the right of the corporation to deal with the debt due it for stock as with any other debt, would have ended the case without further enquiry. But asserting, on the contrary, to its full extent, that such stock debts were trust funds in their hands for the benefit of the corporate creditors, and must in all cases be dealt with as trust funds are dealt with, it was found necessary to go into an elaborate enquiry to ascertain whether a violation of the trust had been committed. And though the court find that the transaction by which the stockholders had been released, was a fair and valid one, as founded on the conditions of the original subscription, the assertion of the general rule on the subject is none the less authoritative and emphatic.—(See, also, *Curran v. State of Arkansas*, 15 How. 504; *Wood v. Dummer*, 3 Mason, 305; See *v. Bloom*, 19 Johnson, 456, and numerous other cases cited in the brief for the appellees in this case and in *Meyer v. Vocke*, assignee, decided with this.)

In the case before us the assignee of the bankrupt, in the interest of the creditors, has a right to enquire into this conventional payment of his stock by one of the shareholders of the company; and on that enquiry, we are of opinion that, as to these creditors, there was no valid payment of his stock by appellant. We do not base this upon the ground that no money actually passed between the parties. It would have been just the same if, agreeing beforehand to turn the stock debt into a loan, the appellant had brought the money with him, paid it, taken a receipt for it, and carried it away with him. This would be precisely the equivalent of the exchange of checks between the parties. It is the intent and purpose of the transaction which forbids it to be treated as valid payment. It is the change of the character of the debt from one of a stock subscription unpaid to that of a loan of money. The debt ceases by this operation, if effectual, to be the trust fund to which creditors can look, and becomes ordinary assets, with which the directors may deal as they choose.

And this was precisely what was designed by the parties. It divested the claim against the stockholder of its character of a trust fund, and enabled both him and the directors to deal with it freed from that charge. There are three or four of these cases now before us in which precisely the same thing was done by other insurance companies organized in Chicago, and we have no doubt it was done by this company in regard to all their stockholders.

It was, therefore, a regular system of operations to the injury of the creditor, beneficial alone to the stockholder and the corporation.

We do not believe we characterize it too strongly, when we say that it was a fraud upon the public who were expected to deal with them.

The result of it was that the capital stock of the company was neither paid up in actual money, nor did it exist in the form of deferred installments properly secured.

It is said by appellant's counsel that conceding this, it is still a debt due by him to the corporation at the time that he became the owner of the debt due by the corporation to Hayes, and, therefore, the proper subject of set-off under section 20 of the bankrupt act. That section is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance

only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that no set-off shall be allowed in favor of any debtor to the bankrupt, of a claim purchased by or transferred to him after the filing of the petition."

This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.

The debts must be mutual, must be in the same right.

The case before us is not of that character. The debt which appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claims.

It is unnecessary to go into the enquiry whether this claim was acquired before the commission of an act of bankruptcy by the company, or the effect of the bankruptcy proceeding. The result would be the same if the corporation was in the process of liquidation in the hands of a trustee or under other legal proceedings. It would still remain true that the unpaid stock was a trust fund for all the creditors, which could not be applied exclusively to the payment of one claim, though held by the stockholder who owed that amount on his subscription.

Nor do we think the relation of the appellant in this case to the corporation is without weight in the solution of the question before us. It is very true, that by the power of the legislature there is created in all acts of incorporation a legal entity, which can contract with its shareholders in the ordinary transactions of business as with other persons. It can buy of them, sell to them, loan to them, and in insurance companies, make contracts of insurance with them, in all of which both parties are bound by the ordinary laws of contract. The stockholder is also relieved from personal liability for the debts of the company. But after all, this artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. And the interest and power of legal control of each shareholder is in exact proportion to the amount of his stock. It is, therefore, but just, that when the interest of the public, or of strangers dealing with this corporation is to be affected by any transaction between the stockholders who own the corporation, and the corporation itself, such transaction should be subject to a rigid scrutiny, and if found to be infected with anything unfair towards such third person, calculated to injure him, or designed intentionally and inequitably to screen the stockholder from loss at the expense of the general creditor, it should be disregarded or annulled so far as it may inequitably affect him. (*Lawrence v. Nelson*, 21 New York R. 158.)

These principles require the affirmation of the decree in the present case, and it is accordingly so ordered.

The cases of *Meyer*, appellant, *v. Vocke*, assignee, and of *Jaeger*, plaintiff in error, *v. Vocke* assignee, from the same court, though differing in some of the facts, the latter especially, being a suit at law brought by the assignee of the bankrupt corporation, in which a set-off was pleaded, the principles which govern the cases are the same.—The case at law was submitted to the court without a jury, and the facts found by the court bring it within the doctrines we have just declared to be applicable to such cases.

The decree in the case of *Meyer v. Vocke*, (580,) assignee, and the judgment in the case of *Jaeger v. Vocke*, assignee, (579,) are, therefore, affirmed.

Mr. Justice HUNT dissented, holding that the transaction was a loan by the company to the appellant.

## Power of one Railroad Company to condemn the Lands of Another.

PEORIA, PEKIN AND JACKSONVILLE RAILROAD COMPANY *v.* PEORIA AND SPRINGFIELD RAILROAD COMPANY.

*Supreme Court of Illinois, November 6, 1873.*

[For this opinion we are indebted to the courtesy of Ingersoll and Puterbaugh, counselors at law, Peoria, Ills.]

1. Eminent Domain.—When one Railroad may condemn lands of another. One railroad company may acquire, by condemnation, the right to use the lands of another company, which such company holds by lease, if it appear that such lands are not eligible or necessary for any purpose of the latter company, but are indispensable to the former; and especially if it appear that the latter company had acquired a lease of the lands to obstruct the former company in the enjoyment of its franchises.

2. Condemnation of land.—Form of the Decree.—Illinois statute.—Where land is condemned to the use of a railroad company, it is error, under the Illinois statute of 1872, after determining the amount of compensation to be paid, to award execution against the petitioner for the same. The proper decree is that, after payment of the sum fixed as compensation, the petitioner have possession of the land.

Opinion of the court by BRESEE, chief justice.

This was a proceeding in the Peoria circuit court, by appellee, a railroad corporation created by an act of the general assembly of this state, against appellant, another like corporation, to condemn certain lands of the latter for the railroad purposes of the former. It appears appellees had condemned lands for the purposes of their railroad, but to obtain access to them it was necessary to pass over the lands claimed by appellants, and of which they had obtained a lease subsequent to the time appellees had acquired their lands. The court granted the prayer of the petition against the objection of appellants, who bring the record here.

The principal point raised and argued at great length by appellants is, that lands once appropriated by a railroad cannot be interfered with in any manner by a rival road. In other words, that a railroad corporation, to whom has been granted the usual powers conferred upon such companies, cannot exercise the right of eminent domain by the legislative grant, in case such exercise would interfere with the property of another railroad corporation, to whom like powers have been granted, and which they have exercised. The argument, when reduced to its proper measure, is, that whilst the lands of all other persons and corporations lying on the route of a railroad are subject to the power of eminent domain, that belonging to a railroad company is not thus subject; that such land must remain intact. We cannot assent to this proposition.

It appears from the record, that the land in question was not acquired by the appellants' company by condemnation for railroad purposes, but that after appellees had, by that proceeding obtained their land for their purposes, appellants obtained a lease of the land in controversy, with a view, it would seem, of obstructing appellees in the enjoyment of their franchises. The proof shows that this land is neither eligible nor necessary for any purpose to appellants' company, whilst it is indispensable to appellees—that whilst it is in the power of appellants to obtain land more suitable for their purposes, it is not in the power of appellees to obtain any land but the piece in question for their purposes. The acts of the general assembly creating these corporations nowhere exempt their lands, not in actual use for railroad purposes, from condemnation. This is a plain case, where one company, to thwart the views and embarrass, or wholly obstruct the operation of a rival company, procures a lease of land necessary to the enjoyment of one company, and not necessary for the other, and thus provided, insists upon an immunity which no other lessee can claim, and no property-owners can assert, against the claim of a railroad corporation, to subject it to condemnation. It does not appear by the testimony in the cause, that appellants will be deprived by this proceeding on the part of appellees of any of their franchises, or embarrassed in any degree in their exercise.

On what ground, then, can this claim of appellants rest? We fail to perceive any plausible, much less any substantial ground. The lands of railroad corporations, not actually in use by such company, or absolutely necessary for the enjoyment of their franchise, must be upon the same footing as the land of an individual, though that may be taken from the actual and profitable use of the owner. We perceive no reason why in this respect railroad companies should claim, and be allowed, immunities not accorded to individual proprietors. The legislature has made no exception in their favor, and none in reason can be made.

Appellees have assigned cross errors on this record, principally as to the form of the entry of the judgment, and awarding execution. The statute provides that the judge or court shall, upon the report of the jury, proceed to adjudge and make such order as to right and justice shall appertain, ordering that petitioner enter upon such property, and the use of the same, upon payment of full compensation as ascertained as aforesaid, and such order, with evidence of such payment, shall constitute complete justification of the taking of such property.—Laws of 1872, § 10, p. 404.

It would seem from this, that the jury must find a gross sum as compensation, which is entered on the judgment of the court, but no execution can issue therefor, for it is optional with the petitioner to take or refuse the land. The statute is explicit, the judgment of the court must be an order authorizing the petitioners to enter upon the land and use the same upon his paying the compensation found by the jury; until that is done, the petitioners have no rights in the land, and cannot enter upon it. This statute evidently contemplates cases where possession has not been taken by the railroad company of the land.

We are of opinion the circuit court properly held this strip of land was subject to condemnation under the proceedings instituted; but there was error in the entry of the judgment and awarding an execution thereon. The statute should be substantially pursued. The judgment is reversed on the cross errors assigned, and the cause remanded to the circuit court, with directions to enter judgment in accordance with section 10 of the act of 1872, above cited.

### Foreign Judgment—Notice—Jurisdiction.

KUHN, NETTER & CO. v. J. W. McMILLAN.

Circuit Court of the United States, District of Kansas, Nov. Term, 1873.

Before DILLON, Circuit Judge.

1. **Delivery Bonds in Attachment Cases.**—Summary judgments without Notice to Sureties.—Where the laws of a state provide that bonds, given to release property from attachment, and conditioned for its redelivery to the officer, shall form part of the record, and that judgment thereon, in the event of the plaintiffs' recovery, shall be entered against the principal and surety of such bond without *scire facias* or notice, a judgment thus entered is not void as to the surety for want of notice, although such surety may at the time be a non-resident of the state.

2. **Appearance—Judgment Entry.**—Record of a judgment entry held to show no appearance by the party praying an appeal from such judgment, as to proceedings subsequent thereto.

In 1866 the present plaintiffs commenced in the courts of Tennessee an attachment suit against Fessenden & Co., and the sheriff levied the writ of attachment upon property worth twice the amount of their claim against Fessenden & Co. Under the statute of that state, Fessenden & Co., as principals, and the present defendant as surety, executed to the plaintiffs a delivery bond in the sum of \$1800, reciting the plaintiffs' suit, the levy of the attachment, etc., and conditioned that "if the attached property should be brought forward and delivered to the sheriff when ordered by the court, or said debt and costs shall be paid and satisfied before that time to the said sheriff, then this obligation to be void; otherwise to be in full force." Fessenden & Co. contested the plaintiffs' claim, but in 1867 the plaintiffs recovered judgment against them, and the record of that recovery, after re-

citing the execution of the said delivery bond, also shows judgment against the present defendant, McMillan, as the surety, jointly with his principals, from which judgment "the defendants" prayed an appeal to the supreme court of the state. In 1869 the supreme court affirmed the judgment against Fessenden & Co., but reversed the judgment as to McMillan, on the ground that when judgment was entered against McMillan, "no breach of the bond had occurred;" but remanded the cause to the court of original jurisdiction, "with directions to order McMillan to deliver the property attached to the sheriff in 60 days from the date of such order, or pay the debt, and upon his failure to do so, the court may enter up a judgment against him and Fessenden & Co. upon said bond, for the amount of the plaintiff's judgment against Fessenden & Co., with interest and costs." The court below, July 19, 1869, made the order as directed, and afterwards, on March 29, 1872, the court, after reciting the amount of the judgment against Fessenden & Co., adjudged "that unless the said McMillan pay said judgment, within 60 days from the date hereof, execution shall issue against the said McMillan and Fessenden & Co."

The present action is brought in this court by the plaintiffs against McMillan on the said judgment of March 29, 1872.

The defence is, that the defendant never appeared in person or attorney, to the suit in Tennessee, nor was he served with summons or process in said action; and in support of this defence it is stipulated "that in March, 1866, McMillan was, and ever since has been a non-resident of Tennessee, and has not been in that state since June, 1866." This is the only proof in the case for the defendant. It is agreed that the statute of Tennessee in force when the proceedings in that state took place, contains a provision by which delivery bonds, such as the one signed by the defendant, are required "to be returned into court and constitute part of the record." Code, sec. 3513. Also the provision that the "court may enter up judgment on the bond against the defendant and his sureties, in the event of a recovery by the plaintiff." (Ib. sec. 3514.) Also the provision that "All bonds \* \* taken in the progress of a cause, form part of the record, and judgment may be rendered thereon, to the extent of the respective liabilities of the parties, upon motion, without *scire facias* or notice." (Ib. § 3109.)

*Barker & Summerfield*, for the plaintiffs; *Hutchings & Brotherton*, for the defendant.

DILLON, Circuit Judge.

There must be a judgment for the plaintiffs. The stipulation as to the non-residence of the defendant, which is his only proof, does not overcome the record entry to the effect that after a joint judgment had been entered against Fessenden & Co. and McMillan, that "the defendants" prayed an appeal, on which appeal the judgment against McMillan was reversed.

The appellate court regarded the present defendant as being before it on that appeal, and reversed the judgment against him.

But without resting my judgment upon this view, I am of opinion that under the laws of Tennessee, the judgment against the defendant as surety on the delivery bond was authorized, and is not, as the defendant's counsel contends, void for want of notice.

Property had been attached and was in the custody of the court. The defendant signed a bond to release the property, and conditioned that he would be liable for any debt the plaintiffs might recover, unless the property released should be re-delivered to the sheriff when ordered by the court. The bond takes the place of the property for which it is substituted, and the statute requires it to be returned and filed in court. By the statute in force at the time the defendant signed the bond, it was provided that the bond should constitute part of the record, and that judgment might be entered thereon against the principal, and surety, in the event of a recovery against the principal, without *scire facias* or notice.

The defendant, therefore, by the execution of the bond in the course of a pending cause, connected his fortunes with the fortunes of his principal, so far at least, as to authorize the court to enter judgment against them thereon.

By the execution of the bond under the statute, the defendant places himself in court, and agrees that judgment may be entered against him, without further process, if judgment is entered against the principal obligors. It is obvious that such is the view taken of the statute by the supreme court of the State, since that court directed the entry of the very judgment which is the basis of the present action. Under the constitution and legislation of congress, that judgment is entitled to the same faith and credit that are due to it in the state from which it came.

Our conclusion is well sustained by authority. *Pratt v. Donovan*, 10 Wis., 378; *McRae v. Mattoon*, 13 Pick., 53; *Bigelow on Estoppel*, 226, and cases cited.

And, under the statutory provisions of the State of Tennessee the conclusion reached can perhaps be reconciled with cases, which as respects the right of special bail to notice, differ from those above referred to. *Robinson v. Ward*, 8 Johns. 86; *Holt v. Alloway*, 2 Blakf. 108.

#### JUDGMENT FOR THE PLAINTIFFS.

### Supreme Court of the United States—Abstract of Decisions of last week.

[Compiled from the New York Herald.]

*Writ of Error from Supreme Court to inferior state court.*—In the case of *Millar v. Moses et al.*, from the supreme court of appeals of Virginia, the Supreme Court of the United States, on the 12th instant, held that a writ of error from this court to review the judgment of a state court must be issued to the highest court of the state, in which a decision of the case could be had, even if that court be an inferior court of the state. Accordingly, where a circuit court of Virginia had jurisdiction to decide a case finally, the court of appeals of that state, not having jurisdiction to review the decision, by reason of the amount in controversy being under \$500, a writ of error from this court issued to the court of appeals was dismissed. If allowable at all, the writ should have been issued to the circuit court. Mr. Justice FIELD delivered the opinion.

*Shipping; Collision.*—No. 140. *Steamship Favorita v. The Union Ferry Company*—Jan. 12, 1874.—Appeal from the circuit court for the eastern district of New York.—This was a libel filed by the ferry company, to recover damages suffered by the ferryboat *Manhasset* by reason of a collision with the *Favorita*, a boat of the Pacific Mail Steam Navigation Company's line, occasioned, as alleged, by the fault of the colliding ship. The defence was that the *Manhasset* was guilty of keeping no proper lookout, and of deviating from her course when the peril was imminent.

The court below found the steamer at fault, and the decree was for the ferry company. That decree is here sustained, the court saying that if there was error at all on the part of the *Manhasset*, it was such a mistake of judgment as would likely be committed by any one in similar peril. Mr. Justice DAVIS delivered the opinion.

*Mechanic's Lien—Waiver of.*—No. 170. *Grant v. Strong*—Jan. 12, 1874.—Appeal from the supreme court of the District of Columbia.—The court in this case hold that where a builder proceeds with the erection of buildings upon a contract to receive at a certain point in the work a negotiable note, payable at three months, for such work, and thereafter accepts such note, his mechanic's lien does not attach; that the reliance in such a case is upon the note and not upon the lien; and this, although the note is not paid at maturity.

Decree reversed. Mr. Justice MILLER delivered the opinion. Mr. Justice SWAYNE dissented.

*Bankruptcy—Fraudulent Conveyance.*—No. 113. *Glenn et al. v. Johnson et al.*—Jan. 13, 1874.—Appeal from the district court for the northern district of Georgia.—This was a proceeding to set aside a conveyance of real estate made by Johnson, a bankrupt, to his wife shortly before his bankruptcy, on the ground that it was a fraud upon his creditors. The

court affirm the decision below, sustaining the conveyance as having been made when Johnson was solvent. Mr. Justice FIELD delivered the opinion.

*Bankruptcy—New promise to pay.*—No. 177. *Allen et al. v. Ferguson*—Jan. 13, 1874.—Error to the circuit court for the eastern district of Arkansas.—This was a suit on a promissory note made by Ferguson. The defence was his discharge in bankruptcy. The replication was that, pending the proceedings in bankruptcy, the holders received a new promise, in writing, to pay the note from Ferguson, and that relying upon that, they took no steps to collect the amount. This new promise was contained in letters from Ferguson, in which he said, at different times, "The debt shall be adjusted," "The debt will be settled," "The matter shall be arranged," &c., &c. The court sustained a demurrer to the replication, and the decision is here affirmed; this court holding that the words in the letters did not amount to evidence of a new promise to pay. Mr. Justice HUNT delivered the opinion.

*Land Law—Act of Congress reinstating Entry.*—No. 542. *McCarty v. Mann et al.*—Jan. 13, 1874.—Appeal from the circuit court for the district of Michigan.—This was a contest to determine the title to certain lands in Ramsey county, Minnesota. The appellants relied upon a decision of the department denying the validity of the entry of the appellee's grantor, and the appellees, upon an act of congress, reinstating it. This court affirm the decree below, sustaining the decision that the act of congress reinstating the entry, vested the title in the pre-emptor, remarking that the law and equity are with the appellees. Mr. Justice SWAYNE delivered the opinion.

*Shipping—Collision.*—No. 123. *Fraser v. The Propeller Winona*—Jan. 13, 1874.—Appeal from the circuit court for the northern district of New York.—This was a case of collision between the schooner *Fremont* and the propeller on Lake Erie, in December, 1869. The district court found the propeller, to have occasioned the collision, and the decree was accordingly. The circuit court reversed the decree, holding that the schooner was at fault in having bad signal lights, and by changing her course contrary to the rules of navigation. This court reverse the decree of the circuit, and sustain the decree of the district court, holding the propeller at fault. Mr. Justice CLIFFORD delivered the opinion.

### Notes and Queries.

EDITORS CENTRAL LAW JOURNAL: In the light of the recent bond decisions all over the country, you will greatly oblige me by giving me your opinion (or refer to authority) on the following: The general statute provides: "They [county commissioners] shall, at the first meeting after their election, and after every general election, choose one of their number chairman, who shall preside at such meeting and all other meetings during the year, if present; but in case of his absence from any meeting, the members present shall choose one of their number as temporary chairman."

Subsequently an act is passed to enable municipal townships to subscribe stock in any railroad, etc., which, among other things, contains this provision: "They [county commissioners] shall cause such bonds as may be required by the terms of said vote and subscription, to be issued in the name of such township, to be signed by the chairman of the board, and attested by the clerk, etc., under seal of the county."

Now, will it relieve the township from paying the bonds now in the hands of an innocent holder for value, by a showing to the court that as a matter of fact the chairman was not only present, but entered his protest of record, against the signing of them; that, because the chairman refused to sign them, the other two members organized themselves into a board, electing one of themselves chairman, and proceeded regularly to order their issuance; and that the temporary chairman signed them as chairman? During the signing of the bonds, and before they were removed from the county, ample time and opportunity was given to the authorities to enjoin their issuance or removal.

Does the doctrine of estoppel operate in favor of the holder?

Or, is the plea of *non est factum* good against him?

ANSWER.—We are aware of no decisions touching the exact points here mentioned. The answer must be derived from a consideration of the statute and its purposes and the principles of law established by the courts in

reference to this class of securities. The course of decision in the federal Supreme Court is well known. As bearing on questions asked, see *Lynde v. Winnebago county*, 16 Wall. 6; *Kennicott v. Supervisors*, 16 Wall. 452, 465, and cases cited; *McKee v. Vernon county U. S. Cir. Ct. for West. Dist. Mo.*, which will hereafter appear in the JOURNAL. But in Kansas, see *Lewis v. Bourbon Co.* 1 CENT. LAW JOUR. 16.

To S. H. P.—Your question seems to relate to a local controversy, or to a question not of much general interest. We would incline to an affirmative answer on the facts as you state them.

EDITORS CENTRAL LAW JOURNAL: Under a statute authorizing our late county court to subscribe for stock in a railway and issue bonds, the stock was subscribed before the abolition of the county court by our new constitution; but the bonds were not issued until after the abolition of the county courts, and were then issued by the persons who were chairman and clerk respectively of the county court while it was in existence.

Are such instruments valid in the hands of *bona fide* purchasers?

J. M. M.

ANSWER.—We recall no decision in point, and will be obliged to any of our readers if they will refer to such.

EDITORS CENTRAL LAW JOURNAL: During a contest between A. and B., the former as vendee, and latter as judgment creditor of C., for title to a house and lot, the house is burnt, and A., tenant in possession, having insurance upon it, collects the amount of the policy. The court decides against A.'s title as fraudulent, and decrees that the lot be sold to satisfy B.'s judgment. Can B. recover from A., under decree to account for rents and profits, the amount received by him under his insurance policy for the burnt house? I am unable to find any ruling upon this point, though I suppose it has been passed upon.

ANSWER.—We do not recall any decision on the exact point. In *Lerow v. Williams*, 9 Allen, (Mass.) 382, it was decided that a person holding property by a conveyance fraudulent against creditors has, nevertheless, an insurable interest; and it is familiar doctrine that insurance contracts are personal, reaching only to the interest of the assured in the subject-matter of the insurance, and not running with the subject-matter insured, except by force of express contract. See May on Insurance, sec. 6, and cases cited.

\* \* \* Several important queries stand over to be answered in our next.

### Notices of Books and Exchanges.

THE LAW OF INSURANCE, AS APPLIED TO FIRE, LIFE, ACCIDENT, GUARANTEE AND OTHER NON-MARITIME RISKS. By John Wilder May. Boston: Little, Brown & Co., 1873, pp. 777.

This treatise, just published by Little, Brown & Co., is intended to cover the entire field of the Law of Insurance, with the exception of maritime risks. The author is a well-known member of the Suffolk bar, and has brought to the preparation of this work not only unwearied diligence, but a mind disciplined by many years of study and active practice. We do not purpose to review the work at length, but a somewhat familiar acquaintance with the modern decisions upon the important subject of which it treats, enables us, after examination, to say to the profession that the results of those decisions are here clearly stated, and that the work is, in our judgment, one of decided and unusual merit. Whatever other works a practising attorney may have on Insurance, he will still need this, for the decisions down to the very latest period are here carefully collected and methodically arranged. Many important judgments upon Insurance, and particularly upon those branches of it not yet fully settled, have been pronounced within the past two years, and with a notably few exceptions, we find these cases all referred to, and in many instances, given with all needed fulness.

After this favorable estimate of the general merits and value of the work, we may be allowed to state that it seems in some minor respects open to criticism. At places the author makes up his text too freely by extracts unnecessary long, from opinions within the reach of every lawyer who would have occasion to use the book; but we are glad to note that this seems principally confined to instances where important topics are illustrated by very recent decisions. There is also less of critical discussion of doctrines arising out of conflicting decisions, than we would have been glad to have seen from so competent a person as the author. He gives, in some in-

stances, in the same or succeeding sections, barely the points decided in the cases cited, without noticing that the cases themselves are not harmonious in principle. The important chapter on the subject of "Insurance Agents, their Powers and Duties," though valuable, and giving the recent cases, including the *Union Mutual Ins. Co. v. Wilkenson*, 13 Wall. 222; *S. C.*, 2 Dillon, C. R. 570, (which will, perhaps, settle the law on the main point it decides, in all courts in which the question is an open one), would, in our judgment, have been improved if the author had more fully called attention to the conflict in the cases and classified and arranged them, thereby to some extent, doing the thinking which his mode of treatment puts upon the reader.

These are our views; but others think differently, and insist that an author best discharges his duty when he presents in logical order the adjudication, just as they are, leaving to counsel and the courts the task of reconciling differences and of selecting between conflicting cases and doctrines.

We consider Mr. May's book a very useful and excellent work, and commend it to the profession.

THE WASHINGTON LAW REPORTER: weekly; \$5 per year: Washington, D. C.; Powell & Ginck, 633 F. Street: Hugh T. Taggart, Editor.

We have received the first number of this publication, and take pleasure in placing it upon our exchange list. We are informed by the editor that since the publication of Cranch's Circuit Court Reports, the last volume of which brings us down to the year 1840, the decisions of what is known to Washington lawyers as the "Old Circuit Court," now represented by the supreme court of the District of Columbia, have not been reported; and that the members of the legal profession who practice at the capital, have hence been deprived of the benefit of a ready reference to local precedents which their brethren elsewhere have enjoyed. To supply this want is one of the leading objects for which the Reporter is founded. It is supposed that the fact that the supreme court of the District has jurisdiction to hear appeals from the commissioner of patents, as well as to issue writs of *mandamus* to the executive officers of the federal government, will give the journal a general, as well as a local importance. We note elsewhere an important decision in the first number, sustaining the validity of contracts between attorneys who prosecute claims against the departments of the government, and their clients, for "contingent fees." We regret that we are not informed whether this case was taken to the Supreme Court of the United States, and trust that the editor, in publishing decisions of the supreme court of the District, which are of general importance, will find it practicable to note, in future instances, whether the decision is final.

We see no reason why a good law weekly, published at the federal capital, should not meet with a general support at the hands of the profession throughout the country. We trust the editor of the Reporter will find it to the advantage of his paper to give it a more general interest, by noting from time to time the proceedings of the Supreme Court of the United States. We wish the Reporter abundant success.

THE SOUTHERN LAW REVIEW; Nashville: Frank T. Reid & Co.: Frank T. Reid, editor: \$5 per annum.

We have received the January number of this publication. It contains much valuable reading matter. We note an interesting reminiscence of the bench of England in 1807, being extracts from the diary of Chief Justice Taylor of North Carolina, written during a visit to England in that year; also a gossip and entertaining article by Walter B. Hill of Macon, Georgia, showing what a poor opinion literary men have entertained of lawyers in all ages and countries; a brief but clear essay by Edmond S. Mallory, on the rule in *Shelley's* case, examining its reason and policy and enquiring whether it ought not to be restored in those states that have abolished it; a scholarly article by Chancellor Cooper, (the first of a series) on *Modern Theories of Government*; and again, an essay by Mr. Mallory, on the *Rebellion*, arguing the question from the standpoint of the states-rights school, and combating the views of a previous contributor. The remaining pages are filled with a digest of recent decisions, and the usual matter found in such a publication. The Southern Law Review has achieved a deserved popularity since its establishment two years ago. We take pleasure in numbering it among our exchanges.

THE IRISH LAW TIMES AND SOLICITOR'S JOURNAL; Dublin, 53 Upper Sackville street: weekly: subscription price, 30 shillings per annum.

Through the courtesy of the editor, Mr. John Falconer, LL.D., bar-

risters, we have been favored with the advantage of exchanging with this ably conducted journal. This is the only legal publication in Ireland. In size and appearance it somewhat resembles the Albany Law Journal. In addition to the usual matter found in such a publication, it furnishes its readers with full reports of the decisions of the Irish courts. These reports, known as the Irish Law Times Reports, are recognized as authority by the Irish judges, and the same respect is accorded to them as to the authorized series. We gladly place this publication on our exchange list, and shall avail ourselves of the privilege of extracting from its columns, anything which may seem of interest to our readers.

**THE GENERAL RAILROAD LAWS of the State of Ohio, in force January 1, 1874, with the Constitutional provisions applicable to Railroad Corporations, and notes of decisions of the Supreme Court of Ohio, relating thereto.** By James A. Wilcox. Robert Clarke & Co., Cin., 1874: pp. 380. Price \$5.

The scope of this work is indicated by its title. The book presents, in a connected and convenient form, the general legislation of Ohio, and constitutional provisions now in force applicable to railroad corporations; also the acts of congress respecting bridges over the Ohio river, and the transportation of mails and animals. The editorial work seems to have been well performed, and all of the decisions of the supreme court construing the statutory and constitutional provisions collected and their substance carefully stated. The index is full, and a lawyer can ascertain, from this work, in a few moments, the exact state of the law of Ohio on the subject of railways, so far as it depends upon the constitution or statutes of the state.

**THE CHICAGO LEGAL NEWS.** Published every Saturday by the Chicago Legal News Company, 161 and 163, La Salle street, Chicago: Myra Bradwell, editor: \$2 per annum.

We like to say something of each one of our exchanges on the occasion of their first visit; but we hardly know what to say of the News. We presume that nearly every lawyer of any considerable standing in the west takes it and is acquainted with its merits. The News may, perhaps, without exaggeration, say to each member of the western bar, "Not to know me, argues yourself unknown."

Its great excellence consists in the fact that it furnishes its readers with an unusual amount of reading matter in the shape of the latest decisions of important courts, judiciously selected, and with carefully prepared head-notes. In her able conduct of this paper, we think that Mrs. Bradwell has, perhaps, done more for the cause of woman than any of her sex.

### Legal News and Notes.

—JUDGE DURELL, of Louisiana, has placed his resignation at the disposal of the president. No disposition has yet been made of it, nor any successor designated.

—GOVERNOR BEVERIDGE, in his message, recommends severe penalties for placing obstructions upon, or tearing up railroad tracks, and for injury to persons through the carelessness or negligence of railway officials.

—GOV. DIX, in his message to the New York legislature, takes strong ground against legislation authorizing the condemnation of lands by towns for public cemeteries, urging that there is no reason why the government should interpose, or why the matter should not be left to private acquirement between the parties.

—THE HON. ANDREW G. MILLER, Judge of the United States court for the eastern district of Wisconsin, has resigned, after thirty-five years of judicial service on the federal bench. He was the oldest federal judge in commission, and is the sole survivor of the judges who administered the bankrupt act of 1841.

—THE supreme court of Texas, after several days' discussion on a test case, has just decided that the law under which the recent general election was held, is unconstitutional. The constitution of Texas provides that the polls shall be kept open four days, and the election act, under which the recent election was held, provides that the polls be kept open for one day only.

—THERE seems to be a conviction abroad that Dr. Kenealy will be disbarred after the conclusion of the Tichborne case, the defence of which he has conducted with a pertinacity and impudence never equalled in a British

court of justice. His frequent violent controversies with the bench, and the angry demeanor of the lord chief justice are not very creditable to any of the professional gentlemen concerned.

—THE judges of the supreme court of New York, for New York city, in general term, have made a rule that "press copies," that is, copies of papers made on manifold paper, will not be received by the court, nor be deemed good service between the parties or their attorneys if [not?] returned within twenty-four hours. A writer in the Daily Register criticises this rule severely; urges that manifold copies are more accurate than manual ones and easier to handle and preserve; and questions the authority of the judges to make the rule.

—MR. WELLS, of Missouri, introduced in the national house of representatives, a bill changing the time of holding the sessions of the Supreme Court of the United States, providing for one session annually, on the second Monday in June, at Washington, D. C., and one annually in the city of St. Louis on the first Monday in October; the session at Washington to hear and determine all cases arising in the 1st, 2d, 3d, and 4th circuits, and that at St. Louis all in the 5th, 6th, 7th, 8th, and 9th circuits. The bill provides for a special clerk for the "central department," with seal, marshal's office, etc., to be located at St. Louis.

—THE suits for the condemnation of property in Cincinnati by the general government for the proposed new post office building, have been concluded. They were commenced in the circuit court of the United States, Judge SWING presiding, and the question of jurisdiction was raised by the counsel for the owners of the property. The arguments upon this question were commenced on the 7th day of October, and occupied about two weeks, being of a most exhaustive character. The Cincinnati Enquirer says: "The questions involved were new in the practice of the court, and the counsel engaged exhausted the learning on the subject, the argument of Mr. Bateman being especially able and thorough. Judge SWING, in a very careful and elaborate opinion, overruled the demurrers and motion to dismiss, in which he held that the circuit court had jurisdiction of the case.

—GOV. DIX has made the following appointments to the bench: Alexander S. Johnson, of Utica, to be judge of the court of appeals in place of Rufus W. Peckham, deceased; Theodore W. Dwight, of New York, to be commissioner of appeals in the place of Judge Johnson transferred to the court of appeals; and Edwin Countryman, of Cooperstown, to be justice of the supreme court of the sixth judicial district in place of John M. Parker, deceased. These appointments are, without exception, good. Judge Johnson was a member of the court of appeals from 1851 to 1859, and won a deservedly high reputation as a judge. A year ago he was appointed to the commission of appeals in place of Judge Ward Hunt, resigned. Judge Dwight is widely known as a legist. He has long been professor in the Columbia law school and a constant advocate of legal and political reform. From his long devotion to the law as a science, we should suppose him to be somewhat deficient in the technics or practice, but this will very likely prove no drawback in the court to which he has been nominated. Mr. Countryman is very highly spoken of by those who know him, not only as regards personal character, but also as to his attainments and ability as a lawyer. We understand that he was strongly recommended by the judges of the court of appeals—an endorsement of the very highest character.—*Albany Law Journal.*

—IT is announced that the publication of Barbour's Reports will end with Volume 65. We doubt whether this announcement will cause much regret. It is doubtful whether the jurisprudence of the country has been much benefitted, as a whole, by the publication of this series. The fact that the court whose decisions they embrace is not one of last resort, diminishes their value to some extent; but this objection would not be a very serious one, if pains had been taken to indicate what decisions were final, and what had been taken to the higher tribunal. Some of the judges whose opinions are reported in Barbour were men of ability; some others were not; and the good and bad work of these courts has been given us without any apparent attempt at discrimination. Consequently, these books embrace perhaps the most discordant series of decisions that have been published in this country. It would, of course, be an exaggeration to repeat what has been sometimes said of them, that it is possible to find in them every sort of law, on every side of every question; but it is doubtless true that they

have had a bad influence in fostering case law and case lawyers wherever they have been used.

This series is to be supplanted by a new series to be issued by John D. Parsons, Jr., of Albany, in monthly parts, at \$15 a year. The name of the new reporter is not given; although the first part is ready for distribution.

—THE withdrawal of the nomination of Attorney General Williams, and the nomination of Caleb Cushing for chief justice, and the subsequent withdrawal of the name of that gentleman, have ceased to be news to our readers. On the 19th instant the President sent to the Senate the name of Morrison R. Waite of Ohio, as chief justice, and it is thought there will be no considerable opposition to his confirmation. Mr. Waite has long been known to the bar of Ohio as a lawyer of ability and great purity of character. It is said that he has twice declined the nomination of judge of the supreme court of his state. His name first became prominent throughout the country in connection with the Geneva tribunal, before which he appeared as counsel for our government, associated with Mr. Cushing and Mr. Evarts—acquitting himself with great credit. Mr. Waite is said to be 58 years of age. He was admitted to the bar in 1839, at Cadiz, Ohio. It is mentioned as a curious circumstance, that his name first appeared on the roll of the Supreme Court of the United States, over which he is now to preside as chief justice, about a year ago, at which time he was introduced by Mr. Cushing. Mr. Waite is a member of the law firm of M. R. & R. Waite, of Toledo, Ohio, and is a member and the presiding officer of the constitutional convention of that state, now in session.

The first announcement of his nomination came to him while in his seat, conducting the deliberations of the convention. A member arose to a question of privilege and read a telegram, conveying the news. It is said that for the time the members forgot their dignity, and the applause was deafening. A member then moved that a committee be appointed to draft resolutions expressive of the sense of the convention with reference to the nomination; but the chairman ruled the motion out of order, and business proceeded as usual.

### Validity of "future" Cotton Contracts.

—The case of *Lehman Bros. v. Strasburger*, which was tried before Judge BUSTEED last spring, was heard on a writ of error by Judge WOODS of the United States circuit court, at Mobile, on the second and third of the present month. *Lehman Bros.* filed a petition to put *Strasburger* into involuntary bankruptcy on a note given for losses on what are commonly known as "future" cotton contracts, which were made, and the losses on which were paid, as they alleged, by *Lehman Bros.* as the factors and agents of *Strasburger*. A trial by jury was had, and Judge BUSTEED, in his instructions to the jury, held such contracts to be illegal. *Lehman Bros.* sued out a writ of error from the circuit court of the United States at Mobile. Judge WOODS has just delivered his opinion at Mobile, in which he decides that the contracts, as proven, are valid and binding. They were proved to have been made according to the rules of the New York cotton exchange. Judge WOODS reverses the finding of the court below, and remands the case for trial by another jury.

### Udderzook's Trial—A Remarkable Case of Circumstantial Evidence.

The *Legal Gazette* for January 2, devotes most of its space to the charge of BUTLER, J., of the court of oyer and terminer of Chester county, Pennsylvania, in the case of *Udderzook*, indicted for the murder of W. S. Goss. Although no point of law is ruled in these instructions, yet as they contain a clear and able summing up of a chain of evidence wholly circumstantial, and as the facts are very peculiar, they afford most interesting reading.

*Udderzook* and *Goss* were brothers-in-law. According to the version of the commonwealth, they entered into a conspiracy to defraud certain insurance companies; and *Goss* having obtained a large amount of insurance on his life in different companies, they rented a small frame tenement in the suburbs of Baltimore, where they ostensibly engaged in perfecting an invention of a substitute for India rubber. The corpse of a man about the size of *Goss* is procured and brought to the house in a box, the contents being represented as machinery to be used in their experiments. While *Udderzook* is temporarily absent at the house of a neighbor, having with

him a third person (who seems to have been picked up as a convenient person, to be used as a witness when needed), the frame tenement occupied by the inventors is discovered to be on fire, and after it is burned to the ground, *Udderzook* makes the discovery that *Goss* was in the house. Search is at once made for *Goss*' body, and, of course, the charred remains of the disinterred corpse are found, and every body thinks it is the body of *Goss*. These remains are sent to *Goss*' family, who pretend to recognize them as his; and shortly afterwards, suit is brought against the insurance companies on the policies held on *Goss*' life. The companies contest on the ground that *Goss* is not dead. Verdict is of course for the plaintiff, but the corporations appeal.

Meantime *Goss*, carrying out his part of the conspiracy, becomes a wanderer, first in Canada, then in Tennessee and elsewhere, under the assumed name of A. C. Wilson. Finally the sinews of war become exhausted, and, half disheartened and broken by excessive drink, he returns to Chester county, Pennsylvania, where he hides away under his assumed name.

And now mark how readily one crime enforces the commission of another. *Udderzook* fearing that *Goss* will become a witness against him, and that he will not only lose the prospective booty, but suffer the penalties of perjury and conspiracy, resolves to put him out of the way. After endeavoring, unsuccessfully, to persuade another brother-in-law named *Rhoades*, to become an accomplice, (without disclosing to him in a definite manner the name of the person proposed to be put out of the way) he resolved to do the deed himself. A buggy is hired, and he and *Goss*, alias *Wilson*, start across the country from *Jennerville* about nightfall. *Udderzook* returns about midnight with the buggy, but *Wilson* is no more seen alive. That night, the wife of a farmer residing near a wood in the direction of which the buggy went, heard the voices of two men hallooing, and distinctly heard one of them cry, "Oh!" The next morning a smoke was seen rising from the wood. When the buggy was returned to the owner, the iron supporting the dasher on the left side was broken; two of the bows supporting the top on the same side were broken and swinging loose; the oil-cloth that had covered the floor was torn out and gone; the blanket and sheet that accompanied the buggy were missing. *Udderzook* gave a satisfactory explanation of these accidents and paid the damages.

It seems that nothing was suspected until about three weeks afterwards, when persons passing by the wood where the hallooing had been heard and the smoke seen, smelled carrion and saw buzzards congregating at a particular spot. An examination discovered the body of a man, less the arms and legs, stabbed and cut in numerous places, slightly covered with dirt and limbs. Further search discovered the arms and legs buried in another place.

The details of the evidence by which this mangled and decomposed corpse was identified as that of *Wilson*, and by which *Wilson* was shown to be none other than *Goss*, and by which the body burned in the shop in Baltimore was shown not to be the body of *Goss*,—are too long to recapitulate. It is sufficient to say that it was of such a character as to leave no room for doubt in the minds of the jury, and fully to warrant their verdict of murder in the first degree.

### Notes of Recent Decisions.

**Bankruptcy.**—A creditor, knowing his debtor to be insolvent, may prosecute his debt to judgment, issue execution, and levy on the property of his debtor, and afterwards have the debtor adjudicated bankrupt for allowing his property to be taken on the execution. *Coxe v. Hale*, U. S. Circuit Court, N. District N. Y., *WOODRUFF, J.*; 5 *Legal Gazette*, 416.

—; *Costs in suit by assignee.*—Where a bill is filed by an assignee without sufficient cause, yet if the circumstances surrounding the transactions complained of are not sufficiently clear, to raise an imputation on the good faith of the assignee in prosecuting the suit, the cost will be charged against the estate of the bankrupt in his hands. *Ibid.*

—; —.—A wife can establish her right to individual property against the husband's creditors only by clear and satisfactory evidence that it was obtained by or through her own exclusive means. The profits were the product of added capital, and as husband and wife lived together, he giving his assistance, the absence of proof that it was her own, raises the presumption that it was furnished by her husband. [*Per Agnew, Ch. J., dissenting.*] *Ibid.*